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No. 94-800

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GARY ALLEN RIMERT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court violate due process when it held there was sufficient circumstantial evidence to support the jury's finding, implicit in its four verdicts finding Rimert guilty but mentally ill, that Rimert failed to meet his burden of proving he did not know right from wrong at the time he killed four people?

II.

Did the South Carolina Supreme Court violate due process when it affirmed the trial court's denial of Rimert's request to charge the jury regarding the sentencing consequences of its verdict?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of South Carolina, urges this Court to deny Rimert's Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported as *State v. Rimert*, ___ S.C. ___, 446 S.E.2d 400 (1994).

STATEMENT OF THE CASE

Gary Rimert stabbed four people to death with a kitchen knife. He told a policeman who responded to an emergency call that he "meant to kill everyone." (R. p. 76). Rimert was indicted and tried by a jury for the murders of Dee Petersen, Ralph Petersen, Alice Rohrs, and Henry Rohrs. The Rohrs were his grandparents. At his trial, Rimert asserted he was not guilty by reason of insanity (NGRI).

Rimert admittedly suffers from a mental disease, paranoid schizophrenia. However, there was conflicting evidence on the issue whether he could distinguish right from wrong.[1] Expert witnesses testified Rimert did not know his actions were wrong at the time he committed the homicides. (R. pp.

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[1]The inability to tell right from wrong is the distinguishing feature of insanity. S. C. Code § 17-24-10 (A), as compared with verdict of guilty but mentally ill. §17-24-20. State law in this regard is discussed in the argument portion of this brief.

340, 382, 424, 426). On the other hand, the trial court found there was circumstantial evidence in the record from which the jury could infer that Rimert knew right from wrong at the time of the homicides. On the basis of this circumstantial evidence, the trial judge denied Rimert's motion for a directed verdict of not guilty by reason of insanity (NGRI).[2] The South Carolina Supreme Court affirmed this ruling, a decision Rimert alleges deprived him of due process.

At trial, Rimert also attempted to waive submission of the possible verdict of guilty but mentally ill (GBMI) verdict to the jury. The trial court, and the state supreme court on appeal, held the submission of GBMI was required by statute whenever insanity was presented as a defense. That issue is not pursued in this petition.

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[2]The particular evidence is enumerated in the argument portion of this brief.

Rimert also requested that the jury be charged the sentencing consequences of the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI) verdicts. (R. p. 349). The trial court denied this request, a ruling the South Carolina Supreme Court upheld on appeal. In this petition, Rimert alleges the trial court's refusal to charge the jury on the sentencing consequences of its verdict was a denial of due process.

In addition to alleging the general failure to charge sentencing consequences deprived him of due process, Rimert alleges the charge was necessary to cure allegedly improper representations in the Solicitor's closing argument. During closing argument to the jury, the Solicitor argued:

> How do you deal with a person who is mentally ill? That's not the issue that we are here to face. It's not a part of your concern. Gary Rimert is mentally ill and he will be dealt with by people that deal with people who are mentally ill. Your concern and your

> decision is he responsible for what he did criminally under the law . . . [emphasis supplied].

(R. p. 290, lines 20-25). There was no contemporaneous objection to this argument, but the trial court nevertheless offered to give a curative charge. The Court offered to charge the jury that sentencing was "of no concern to them." Rimert expressly refused the offer of this curative charge. (R. pp. 293, 294).

The jury returned verdicts of GBMI on each of the four murder charges. The trial court sentenced Rimert to four life sentences, to be served concurrently. Rimert appealed.

On appeal Rimert argued, "the jury's verdict that appellant was criminally responsible at the time of the offense is without evidentiary support." (App. Br. p. i). The South Carolina Supreme Court disagreed, finding there was sufficient evidence that Rimert knew right from wrong

to submit the issue to the jury. Justice Moore, writing for four of five members of the South Carolina Supreme Court, wrote:

> Here, there was testimony from an officer who arrived on the crime scene shortly after the murders that appellant knew he had done something wrong. Further, the State presented other evidence of sanity, including that appellant washed off the knife and questioned how he could "get out of this." There was sufficient evidence of appellant's sanity and the trial court did not err in denying his motion for a directed verdict. [citations omitted].

446 S.E.2d at 401.

Rimert also argued in the state supreme court that, "[u]nder the circumstances of this case, the trial judge should have informed the jury of the legal consequences of their verdicts." (App. Br. p. ii). The appellate court squarely rejected this argument, holding instead, "the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense." 446 S.E.2d at 401.

Although Rimert asserted on appeal, ancillary to his argument on this second issue, that the Solicitor had opened the door to a charge on the sentencing consequences when he argued Rimert would be "dealt with by people that deal with people who are mentally ill," the S.C. Supreme Court did not reach the issue. The Court's opinion implies that not only did it consider the issue procedurally barred, but also that the curative charge as offered and refused was adequate. On this issue the opinion noted:

> The trial court ruled that even though appellant did not make a contemporaneous objection to the solicitor's closing argument, he would give the jury a curative instruction that sentencing was of no concern to them. *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978)(instruction on post-verdict dispositions is proper to cure a misstatement of law). Appellant refused this charge. Appellant argues the offered instruction was not curative and instructions on the effects of the verdicts were the only instructions which could have cured the solicitor's comments. We disagree.

446 S.E.2d at 401.

SUMMARY OF ARGUMENT

Since the law of South Carolina places the burden of proving insanity on a defendant, as an affirmative defense, it was not a violation of due process when the S.C. Supreme Court upheld a jury's determination of guilt, a factual conclusion based on circumstantial evidence which supported an inferene Rimert knew right from wrong when he killed four people.

Since under the law of South Carolina a jury making a determination of guilt or innocence has no authority over sentencing, it was not a violation of due process for the trial judge to deny Rimert's request to charge the sentencing consequences of the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI).

Because a jury with no authority to determine sentence is not to be concerned with the sentencing consequences of its decision, because the Solicitor's closing

argument to the jury did not misstate the law, and because Rimert declined the trial court's offer of a curative charge, it was not a violation of due process for the S.C. Supreme Court to rule that it was not error for the trial court to fail to charge the sentencing consequences of an insanity verdict.

Although the State did not object to inclusion in the Record on Appeal of a juror's attempt to impeach his verdict, the State expressly refused to accede to any positions or legal conclusions advanced by Rimert as the basis for his request to include the matter in the Record. In this respect, Rimert has misrepresented the State's position.

ARGUMENT I

THE SOUTH CAROLINA SUPREME COURT DID NOT VIOLATE DUE PROCESS WHEN IT RULED THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS SUFFICIENT TO SUPPORT THE JURY'S CONCLUSION THAT RIMERT KNEW RIGHT FROM WRONG WHEN HE KILLED FOUR PEOPLE.

This issue is controlled by *Leland v. Oregon*, 443 U.S. 790 (1952), because under South Carolina state law a defendant bears the burden of proving insanity, as an affirmative defense, by a preponderance of the evidence. *See* Section 17-24-10, Code of Laws of South Carolina, Cum Supp. 1993 (governs insanity defense). *Leland* held it is not a violation of due process for a state law to allocate the burden of proving insanity to a defendant. The South Carolina Supreme Court did not ignore the requirements of *Jackson v. Virginia*, 443 U.S. 307 (1979), as Rimert argues. Rimert simply failed to meet his burden of proving

insanity to the jury.

To prove insanity under South Carolina state law, a defendant must show not only that he had a mental disease or defect, but also that he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. Section 17-4-10, *supra*. If a defendant proves he suffers from a mental disease or defect but he nevertheless retained the ability to discern right from wrong, he is guilty but mentally ill rather than insane. *See* Section 17-24-20(A), Code of Laws of South Carolina, Cum. Supp. 1993 (governs GBMI). The jury's verdict finding Rimert guilty but mentally ill indicates the jury found that, although Rimert suffered from a mental disease or defect, he knew right from wrong at the time of the killings.

Seeking review by this Court, Rimert rails against his standard of proof on the

issue of insanity. He argues, essentially, that where circumstantial evidence conflicts with expert testimony, the jury is bound by the conclusions of the expert witnesses. He urges that any other rule would violate *Jackson v. Virginia, supra.* Rimert's argument is meritless.

There are two divergent views concerning the legal effect of insanity. One view, adopted as federal common law, is that sanity itself is a component of the mental state required for the existence of criminal intent. *See Davis v. United States*, 160 U.S. 469 (1895). Under such a view, when insanity is raised as a defense the government bears the burden of proving the existence of sanity beyond a reasonable doubt. *Moore v. Duckworth*, 443 U.S. 713 (1979). There is, however, a second view of insanity, and it is this second view which represents the law of insanity in South Carolina.

In South Carolina, although a mental condition may affect the existence of the *mens rea*, is not assumed to do so. Following from this view, insanity in this state is an affirmative defense, introduced by a special plea and decided by a special verdict; and the burden of proving insanity rests upon the defendant. S.C. Code §17-24-10. Allocation of the burden of proof in this manner does not violate due process. *Leland v. Oregon*, 443 U.S. 790 (1952).

The Oregon law governing insanity is similar to the law of South Carolina in that the burden of proving insanity rests upon the defendant. In *Leland*, this Court held that the state of Oregon's requirement that a defendant asserting the defense of insanity must prove that defense beyond a reasonable doubt did not violate due process. Because in Oregon sanity was not an element of the crime of murder, this Court reasoned that Oregon's rule did not

relieve the State from proving all of the necessary elements of guilt beyond a reasonable doubt.[3] Similarly in this case, allocation of the burden of proving insanity as an affirmative defense did not relieve the state from its burden of proving every element of its case under the reasonable doubt standard. For this reason, and contrary to the argument by Rimert, there was no violation in this case of the *Jackson v. Virginia*[4] standard of proof.

Under the law of South Carolina, if there was any evidence of guilt, the trial

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[3]*Id.; see also Mullaney v. Wilbur*, 421 U.S. 684 (1984)(Rehnquist and Burger, explaining *Leland* in concurrence); *Foucha v. Louisiana*, ___ U.S. ___, 112 S.Ct. 1780 (1992)(Kennedy, explaining *Leland* in dissent); W. LaFave & A. Scott, Jr., 1 Substantive Criminal Law §4.1(b), pp. 429-430 (1986).

[4]*Jackson v. Virginia*, 443 U.S. 307 (1979), held that the relevant question as to the sufficiency of evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

judge was obligated to submit the issue to the jury.[5] The evidence which could have supported the inference of malice was summarized at pages 10 -12 of Respondent's brief in the appeal before the state supreme court:

A. Evidence that Rimert was discharged from a mental hospital on Wednesday before the Saturday killings implied that some physician made a determination that he was not dangerous to himself or others. (R. p. 162). This determination might have included assessment of Rimert's capacity to know right from wrong.

B. Evidence that his parents allowed

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[5]*State v. Robinson*, ___ S. C. ___, 426 S.E.2d 317 (1993)(in considering a motion for a directed verdict, the judge is concerned with the existence or non-existence of evidence, not with its weight, and the case should be submitted to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly or logically deduced).

Rimert access to the family car implies his parents did not consider him criminally delusional or dangerous. (R. pp. 200, 170).

C. Evidence that his parents did not notify the police when he was missing with a car implies they thought he was at least marginally rational. (R. p. 201, 170).

D. Evidence that he was capable of driving from Indiana to his grandparents' home in South Carolina indicates he had significant control of his mental faculties (R. pp. 201 - 202).

E. Evidence that his parents did not warn his grandparents of any ominous mental state implies they did not consider him to be under the dominion of command hallucinations. (R. p. 203).

F. Evidence that the guard at the River Hills housing development gate did not notice anything abnormal about Rimert

implies he was acting coherently when he went to his grandparents' that morning.(cf. tr. pp. 3-5).

G. Evidence that Rimert called his mother and asked her to come immediately, saying, "when are you coming down, can you be here any sooner", (R. 205), indicates that Rimert knew his thoughts were not right.

H. Evidence that he killed the only possible eyewitnesses to his grandparents' deaths could indicate he was aware of the culpability of his conduct.

I. Evidence that he washed the knife could imply that Rimert had an awareness that his conduct had been wrongful. (R. pp. 120 - 121).

J. Evidence he did, in fact, know his grandparents were dead (R. p. 40; Defendant's Exhibit 23) indicates Rimert was in touch with the reality of

the situation, and this also conflicts with expert testimony indicating it took several months for Rimert to understand that his grandparents were actually dead. (R. pp. 158, 159).

K. Evidence that Rimert himself was surprised by his actions, as when he told officer Hudgens he felt like he was possessed (R. p. 74), and that he was "speechless" and felt like "arrest me please" (R. p. 75) indicates Rimert knew the behavior he had just engaged in was wrongful.

L. Evidence that he seemed calm and coherent after the murders, followed instructions, and did as he was told (R. pp. 8, 69, 96 - 100, 105, 108 - 111) could be viewed as evidence of sanity, although this view admittedly would conflict with the expert testimony of Dr. Morgan. (R. pp. 219, 220).

M. Evidence that Rimert, although calm and coherent, exhibited facial expressions (R. p. 65) contradicts expert testimony to the effect that one of the symptoms of Rimert's schizophrenia was lack of affect or emotion (R. pp. 219, 220).

N. Evidence that Rimert appeared to understand and respond to questions by police, and even to carry on a conversation with them, indicates his mental faculties were not impaired to the point of hindering verbal communication. (R. pp. 60, 78, 98 - 100, 105, 108, 111).

O. Evidence that he knew he was in trouble, as when he asked, "What do I have to do to get out of this" (R. p. 110) indicated that at least very close in time to the murders Rimert understood that he had done something wrong.

P. Lack of any observation by lay

observers who saw him that day of any behaviors which indicated Rimert was responding to internal stimuli or otherwise hearing voices (Eg. R. p. 78) indicates he may not have been as actively psychotic in the presence of casual observers as he was in the presence of mental health personnel, who observed him to be "very psychotic" and "hearing voices". (R. pp. 157, 158).

As the South Carolina Supreme Court stated in *State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985), "[a]ny evidence of sanity is sufficient to present a jury issue when the defendant relies on the affirmative defense of insanity." 336 S.E.2d at 477. The prosecution presented sufficient evidence of sanity to create a jury issue. The South Carolina Supreme Court did not deny Rimert due process when it ruled there was sufficient evidence of

sanity to create a jury issue and, accordingly, upheld the jury's verdict.

ARGUMENT II

THE SOUTH CAROLINA SUPREME COURT DID NOT VIOLATE DUE PROCESS WHEN IT RULED THE TRIAL COURT PROPERLY REFUSED TO CHARGE SENTENCING CONSEQUENCES TO A JURY WHEN THAT JURY HAD NO AUTHORITY TO FIX SENTENCE.

This issue is controlled by *Shannon v. United States*, ___ U.S. ___, 114 S.Ct. 2419, 62 U.S.L.W. 4621 (1994). *Shannon* held that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed. Moreover, this Court held in *Shannon*, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact finding responsibilities, and creates a strong possibility of confusion. *Id*. Based on this reasoning, it was not a violation of due process for the trial court to deny Rimert's request to charge the consequences

of its verdict to the jury when that jury had no function in determining the sentencing consequences of its decision on the issue of guilt.

The dangers inherent in instructing juries on sentencing consequences were highlighted in the state case of *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978). The jury in that case was instructed, over Huiett's objection, as to the possibility that appellant would be released from custody if the jury returned a verdict of not guilty by reason of insanity. Huiett, represented at trial by the same counsel who now represents Rimert, successfully obtained reversal of the jury's verdict. The South Carolina Supreme Court was persuaded by Huiett's argument that

> the jury may have failed to return a not guilty by reason of insanity verdict because it could result in freeing the defendant in a short time and thereby put a dangerous individual back in society.

246 S.E.2d at 864. This reason which

supports state law also supports federal law.

In *Shannon* this Court observed that an accurate instruction about the NGRI verdict would give no assurance to jurors who fear quick release as a result of an insanity verdict. As Justice Thomas wrote for the majority in *Shannon*:

> the only mandatory period of confinement for an insanity acquittal is the period between the verdict and the hearing. Instead of encouraging a juror to return an NGI verdict, . . . such information might have the opposite effect -- that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less.

62 U.S.L.W. 4624. South Carolina law is not materially different in this respect.

In South Carolina a defendant acquitted on the basis of insanity is not necessarily committed for any period of time. A commitment hearing is held after an evaluation period "not to exceed one hundred twenty days." Depending on the result of

that hearing, the defendant may be released. Section 17-24-40 Code of Laws of South Carolina, 1985. Therefore, under South Carolina law, the only mandatory period of confinement for an insanity acquittee is the period between the verdict and the hearing. Id. The stark truth is that a jury instructed in the consequences of a NGRI verdict would be aware that the NGRI verdict could result in the defendant's release from custody immediately after a civil hearing. For this reason *Shannon* and *Huiett* are indistinguishable from the present case.

Rimert's additional argument, that a charge regarding sentencing consequences was appropriate in response to the Solicitor's closing argument, begs its own question by assuming the worst possible interpretation of the Solicitor's comment. Viewed as a whole, the Solicitor's argument was an admonishment to the jury that it should not be concerned with the consequences of its

verdict. Indeed, the Solicitor strongly implied that an insanity verdict would result in a civil commitment. He told the jury Rimert would be "dealt with by people that deal with people who are mentally ill." Perhaps this view of the Solicitor's comment was also the reason Rimert declined the trial judge's offer of a curative charge. Based upon that express rejection of a curative charge, Rimert should now be precluded from raising that comment as grounds for error, and the South Carolina Supreme Court implied as much when it declined to reach the issue.

Further, the Solicitor's comment was not a misstatement of South Carolina law. As was pointed out during oral argument before the state supreme court, a defendant who is found guilty but mentally ill is sent to a "facility designated . . . for treatment and retained there until in the opinion of the staff at that facility the

defendant may safely be moved to the general population of the Department of Corrections . . . ." Section 17-24-70, Code of Laws of South Carolina, Cum. Supp. 1993. The Solicitor did not inaccurately portray the law when he urged the jury not to consider the consequences of its verdict and reassured them that, no matter what their verdict, Rimert would be dealt with by people who deal with those who are mentally ill.

Finally, the addition of a juror's attempt to impeach his own verdict should not serve as a basis for certiorari. As Rimert acknowledges in his brief, both state and federal law prohibit attempts to impeach a jury verdict by way of testimony from a juror concerning alleged improprieties by the jury. *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967)(testimony or affidavits of jurors will not be received on the hearing of a motion to set aside a verdict on the

ground of mistake, irregularity or misconduct on the part of the jury or some one or more of the panel); *State v. Parris*, 163 S.C. 295, 161 S.E. 496 (1931); *Tanner v. United States*, 483 U.S. 107 (1987); F.R.Evid. 606(b). The record on appeal contains the polling of the jury, along with juror Polk's express affirmance of his verdict. (R. p. 326).

In his petition, Rimert misrepresents the matter to which the State "acceded" when it did not object to supplementation of the Record on Appeal. The appellate rules of the South Carolina Supreme Court provide for liberal inclusion of matter in the Record on Appeal. Rule 209, SCACR (record on appeal "shall include all matter designated to be included by any party . . . "). Inclusion of matter in the Record on Appeal simply means that one party wants it included; it is not a stipulation concerning the weight

or admissibility of the evidence.[6]

The letter in which the State acquiesced to Rimert's motion to supplement the Record expressly states, "Respondent does not acquiesce to Rimert's argument concerning the weight this Court should give the supplemental information . . . ." (Letter to South Carolina Supreme Court dated July 12, 1994). Respondent has never agreed to Rimert's argument that the evidence was admissible. To the contrary, although the issue was not argued on appeal, the State's position is that the trial court properly refused to consider the evidence. *State v. Wells], supra; State v. Parris, supra.*

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[6]If inclusion of disputed matter in a record on appeal precluded appellate argument on the issue of the matter's admissibility or propriety, no disputed matter could ever be placed in an appellate record.

CONCLUSION

Rimert failed to carry his burden of proof on the issue of insanity, and the South Carolina Supreme Court did not violate due process when it refused to second guess the jury on that issue. Additionally, the South Carolina Supreme Court did not deny Rimert due process when it held the trial court properly refused to charge the sentencing consequences to a jury which lacked authority over sentencing. Finally, since Rimert expressly rejected the offer of a curative charge in response to a remark by the Solicitor, the South Carolina Supreme did not deny him due process when, without expressly reaching the issue, it implied he was precluded from asserting error based on that remark. For these reasons

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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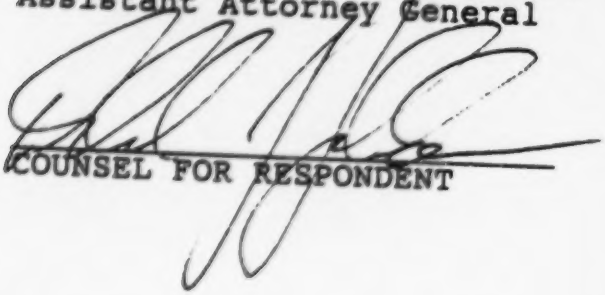

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December 1, 1994